No. 12-9

In The Supreme Court of the United States

HARRY ARZOUMANIAN, GARO AYALTIN, MIRAN KHAGERIAN, AND ARA KHAJERIAN,

Petitioners,

v.

MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, MICHIGAN, NEVADA, AND RHODE ISLAND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KAMALA D. HARRIS
Attorney General
of California
MARK BRECKLER
Chief Assistant
Attorney General
MANUEL M. MEDEIROS
State Solicitor General
LOUIS VERDUGO
Senior Assistant
Attorney General
ANGELA SIERRA
Supervising Deputy
Attorney General

ANTONETTE BENITA CORDERO*
Deputy Attorney General
300 South Spring Street,
Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2039
Fax: (213) 897-7605
Antonette.Cordero@doj.ca.gov
**Counsel of Record*

Attorneys for Amici Curiae
[Additional Counsel Listed On Signature Page]

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Amici States will address the following question presented by petitioners:

> Can a state law concerning traditional state responsibilities, such as extending the statute of limitations and providing forum access for insurance claims, be invalidated under the foreign affairs doctrine in the absence of a conflict with federal policy or an indication of federal intent to preempt the field?

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INTEREST OF THE AMICI CURIAE[1]

Amici States have a compelling interest in preserving their ability to regulate in areas of traditional state responsibility and in defending their lawfully enacted statutes where they do not conflict with federal law or foreign policy. Here, the Ninth Circuit Court of Appeals invalidated a statute that regulates how and when certain claims for recovery under insurance policies may be brought – an area of traditional state competence – with no finding that the statute conflicts with any federal foreign policy or law. In doing so, the Ninth Circuit broadened the application of field preemption in the context of the foreign affairs doctrine to such an extent that it threatens to upset the proper balance of power our federal system demands. The court's holding is inconsistent with this Court's instruction that "even treaties with foreign nations" – which provide much clearer expressions of federal foreign policy than anything present here – "will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." *United States v. Pink*, 315 U.S. 203 (1942).

[1] Counsel of record for the parties received timely notice of the States' intent to file this amici curiae brief more than ten days before the due date in compliance with Supreme Court Rule 37.2(a).

STATEMENT

California Code of Civil Procedure section 354.4[2] authorizes Armenian Genocide victims and their

[2] Code of Civil Procedure Section 354.4 provides:

(a) The following definitions govern the construction of this section:

(1) "Armenian Genocide victim" means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.

(2) "Insurer" means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.

(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.

(c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2016.

(d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

heirs or beneficiaries to file, by December 31, 2010, and pursue in the California courts, certain classes of claims arising from insurance policies sold to, and held by, such victims during the period 1875 to 1923.[3] Plaintiffs sued under that statute to collect on life insurance policies sold to individuals who later became victims of the Armenian Genocide.

Petitioners seek review of a Ninth Circuit decision invalidating Section 354.4.[4] The en banc court held that California's statute falls outside the realm of traditional insurance regulation and that it's "real" purpose was to provide redress for "victims of foreign genocide." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076 n. 4 (9th Cir. 2012). The Ninth Circuit thus concluded that the statute intrudes on the federal government's exclusive power to conduct and regulate foreign affairs and is, therefore, preempted. *Id.* at 1077. The Ninth Circuit did not rely on any finding of a direct conflict with federal foreign policy, but rather applied a foreign affairs field preemption theory to invalidate the California statute.

[3] In July 2011, while en banc review was pending, the statute was amended to extend the time in which to bring such actions to December 31, 2013. Cal. Stats. 2011, ch. 70 (Assem. Bill No. 173 (2011-2012 Reg. Sess.) § 1.

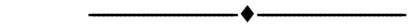
[4] Unless otherwise indicated, all statutory references in this brief are to the California Code of Civil Procedure.

SUMMARY OF ARGUMENT

This case concerns an important federal question regarding application of the foreign affairs doctrine to preempt state laws that do not directly conflict with any established federal foreign policy. Specifically at issue in this case is whether "field preemption" analysis is ever appropriate under the foreign affairs doctrine. In *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003), this Court expressly left that question unanswered. Clarifying this important point for the States is sufficient justification for granting the petition for writ of certiorari.

Amici States assert that where, as here, a state law does not conflict with federal foreign policy or interfere with the federal government's conduct of foreign affairs – either on its face or as applied – preemption is not warranted. Amici States also believe that the Ninth Circuit erred when it reasoned that field and conflict preemption are alternative available theories, and that whether one or the other applies turns on the question whether the state statute at issue regulates in an area of traditional state responsibility. Amici urge the Court to clarify that the question whether a State is regulating in an area of its traditional competence should be considered only when there appears to be a conflict with federal policy. In those circumstances a court may need to ascertain the purpose of the state law to determine the weight to be given the state's interests when balancing those interests against conflicting federal policy.

This Court should grant the petition for writ of certiorari to resolve these important issues.



ARGUMENT

This Court Should Clarify that State Laws May Not Be Preempted Under the Foreign Affairs Doctrine Unless They Actually Intrude on Federal Foreign Policy.

A. This Court Has yet to Decide if Field Preemption Analysis Is Appropriate to Assess State Law Preemption Under the Foreign Affairs Doctrine.

The Constitution neither expressly grants the federal government general power over foreign affairs, nor expressly denies all such powers to the States. However, this Court has articulated a "foreign affairs doctrine," based on several provisions of the Constitution, which reserves particular foreign affairs powers exclusively to the federal government. See, e.g., *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). In accord with this doctrine, where state laws impair

the effective exercise of the Nation's foreign policy, they must yield. *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 419 (2003) (quoting *Zschernig v. Miller*, 389 U.S. 429 (1968)); *Pink*, 315 U.S. at 230-231.

Amici States do not take issue with this rule, but rather with the Ninth Circuit's decision below that "[f]oreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption." *Movsesian*, 670 F.3d at 1071 (citing *Garamendi*). *Garamendi* is not authority for the proposition that field preemption is an appropriate theory of preemption analysis under the judicially-created foreign affairs doctrine, inasmuch as the Court's holding rests on a finding of actual conflict with federal policy. In *Garamendi*, though examining "the contrasting theories of field and conflict preemption," this Court did not have to decide whether a field preemption analysis was permissible – and expressly did not do so. *Garamendi*, 539 U.S. at 419-420.[5]

The Ninth Circuit also relied on this Court's decision in *Zschernig* to support its application of a field preemption analysis. But that case, too, is distinguishable and does not settle the point. It is true that in *Zschernig* this Court invalidated an Oregon

[5] Four members of the Court, Justices Ginsberg, Stevens, Scalia, and Thomas, would have upheld the law at issue in *Garamendi*, citing the absence of "a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs." *Garamendi*, 539 U.S. at p. 430 (Ginsberg, J., dissenting).

probate law without finding a specific conflict with any federal treaty, agreement, or foreign policy. But in that case, the Court found evidence of actual intrusion on federal prerogatives by looking at the manner in which the statute had been applied for more than a decade. *Zschernig*, 389 U.S. at 432.

The law at issue in *Zschernig* prohibited nonresident aliens from claiming real or personal property unless the countries of their citizenship or residence provided certain reciprocal rights to United States citizens, and only if the foreign heirs could prove that their inheritance would not be confiscated by the governments of their countries. *Zschernig*, 389 U.S. at 430-431. This Court observed that in applying the law, Oregon courts had engaged in "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment'" about whether others had been denied that right. *Zschernig*, 389 U.S. at 435. The Court concluded that "the statute as construed seem[ed] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Such foreign affairs and international relations matters, this Court said, are entrusted by the Constitution solely to the federal government. *Id.* at 436.

While the majority opinion and Justice Stewart's concurring opinion, joined by Justice Brennan, arguably endorsed a field preemption analysis, Justice Harlan, with whom Justice White substantially joined,

disagreed. *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in result); see *id.* at 462 (White, J., dissenting). Justice Harlan would have required a finding of a "specific interest of the Federal Government which might be interfered with" by the Oregon law. *Id.* at 459.

Significantly, after reviewing the majority and concurring opinions in *Zschernig*, this Court in *Garamendi* still considered it "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi*, 539 U.S. at 419-420. The Ninth Circuit's decision below concludes, nevertheless, that the "fair question" was not only posited in *Garamendi*, but was actually resolved – but it was not. It is time for the Court to clarify this important point of federalism for the States.

B. Preemption Under the Foreign Affairs Doctrine Is Not Warranted When, As Here, Implementation of a State Law Neither Conflicts with Federal Foreign Policy Nor Interferes with the Federal Government's Conduct of Foreign Affairs.

Although some of this Court's language in *Garamendi* and *Zschernig* may have suggested application of a field preemption analysis, as was discussed above, no decision of this Court has invalidated a state law under the foreign affairs preemption doctrine without a showing that the law's implementation conflicts

with a specified foreign policy or actually impairs the federal government's effective exercise of foreign affairs.

In *Garamendi*, the Court reasoned that preemption was warranted because of the likelihood that the state law at issue there would "produce something more than incidental effect *in conflict with express foreign policy of the National Government*. . . ." *Garamendi*, 539 U.S. at 420 (emphasis added). In dicta, the *Garmendi* majority did suggest that field preemption might be appropriate "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419, n. 11. But ultimately the Court concluded that "[t]he express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield." *Garamendi*, 539 U.S. at 425.

Similarly, in *Zschernig*, construction and application of the state law at issue brought with it value-laden judgments about the actions and policies of foreign nations and the credibility of foreign representatives. In fact, this Court noted that state courts' treatment of legatees in Communist countries under such statutes was "notorious." *Zschernig*, 389 U.S. at 440. Based on that history, and considering the actual *effects* of the Oregon law vis-à-vis federal foreign policy, the Court was able to determine that "foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. [Footnote omitted.] Yet they of course are matters for the Federal

Government, not for local probate courts." *Id.* at 437-438.

Requiring a showing of actual conflict with foreign policy or demonstrated interference with foreign affairs is consistent with the purpose of the foreign affairs doctrine. That doctrine preempts state efforts to make their own foreign policy or to alter foreign policy set by the federal government. See *Zschernig*, 389 U.S. at 440-441. California attempted neither by enacting Code of Civil Procedure Section 354.4.

Section 354.4 authorized "Armenian Genocide victims" to file, on or before December 31, 2010, and pursue in the state's courts, certain classes of claims arising from insurance policies sold to and held by them during the period 1875 to 1923. In enacting this statute, California has done nothing comparable to what was found in *Zschernig* or *Garamendi*. The State has not injected itself into relations with former wartime enemies. It has not sought to modify any prior federal resolution of these claims or alter any federally-established process for resolution of these claims. Nor does Section 354.4 invite California courts to pass judgment on foreign systems of government or question the veracity of their representatives. Rather, the "problem" here, as the Ninth Circuit sees it, is that, by simply referring to the event as the "Armenian Genocide," the law "expresses a distinct political point of view on a specific matter of foreign policy." (*Movsesian*, 670 F.3d at 1076). But the court did not find that the statute's description of those events actually conflicts with the federal government's. In

effect, in the Ninth Circuit's view, the foreign affairs doctrine allows judicial censorship of state legislatures because of the potential offense of foreign officials – whether or not the political branches have expressed their views on the subject, and whether or not the actual implementation of the statute interferes in any way with the conduct of foreign affairs.

No treaty, congressional resolution, or executive agreement establishes or articulates a federal foreign policy that conflicts with, or displaces, Section 354.4. No decision of this Court holds it sufficient for preemption purposes that a state law merely touches on a controversial subject in foreign relations.

C. Only When There Is an Apparent Conflict Between Federal Policy and the Implementation of a State Law Should a Court Consider Whether the State Is Regulating Within a Traditional Area of Its Sovereignty and Weigh the Comparative State and Federal Interests.

Guided by its misunderstanding of *Garamendi*, the Ninth Circuit incorrectly looked to the subjective intent of the California Legislature in adopting Section 354.4, rather than to the *effects* of that law, to determine whether the law is preempted under the foreign affairs doctrine.[6] The court struck down

[6] In reaching this conclusion, the court was guided by its earlier, equally-flawed approach in *Von Saher v. Norton Simon*

(Continued on following page)

Section 354.4 on a field preemption theory because it believed that the statute's real purpose "is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events [the Armenian Genocide]." *Id.* at p. 1076. Nothing in *Garamendi* supports such a simplistic intrusion on state sovereign prerogatives.

This Court's inquiry about whether the state law at issue addressed an area of traditional state competence *rested on* the Court's recognition of an actual conflict between state law and federal foreign affairs. The Court weighed the comparative state and federal interests to determine whether the conflict was sufficiently serious to warrant preemption. *Garamendi*, 539 U.S. at 426. To be sure, the Court did state there was "no serious doubt that the state interest actually underlying [the state law] is concern for the several thousand Holocaust survivors said to be living in the State." *Id*. But the Court went on to caution that "this fact does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction." *Id.* It was pursuant to this more nuanced approach, that the Court weighed the State's real interests and concluded that "[i]f any doubt about the clarity of the conflict remained, . . . it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state

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Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S. Ct. 3055, 180 L. Ed. 2d 885 (2011).

legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA." *Id*. at 425.

The Ninth Circuit's purported balancing of state sovereign prerogatives against unarticulated and speculative federal interests to strike down Section 354.5 was unwarranted and unsupported by this Court's jurisprudence.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: August 1, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MARK BRECKLER
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
LOUIS VERDUGO
Senior Assistant Attorney General
ANGELA SIERRA
Supervising Deputy Attorney General
ANTONETTE BENITA CORDERO*
Deputy Attorney General
**Counsel of Record*

Attorneys for Amici Curiae

BILL SCHUETTE
Michigan Attorney General
P. O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-1110

CATHERINE CORTEZ MASTO
Attorney General of Nevada
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701
Telephone: (775) 684-1112

PETER F. KILMARTIN
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400

Additional Attorneys for Amici Curiae